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| 10/634,106 | 08/04/2003 | Christopher Stvartak | 200700-9109 | 6384 |
| 1131 | 7590 | 03/31/2004 | EXAMINER | |
| MICHAEL BEST & FRIEDRICH LLC 401 NORTH MICHIGAN AVENUE SUITE 1700 CHICAGO, IL 60611-4212 | | | SPISICH, MARK | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 1744 | |

DATE MAILED: 03/31/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/634,106

Applicant(s)

STVARTAK ET AL.

Examiner

Mark Spisich

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 February 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 and 18-24 is/are pending in the application.
- 4a) Of the above claim(s) 4 and 21-24 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3, 5-13 and 18-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 04 August 2003 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 11/03.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Claims 4 and 21-24 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention/species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper of 23 February 2004.

Drawings

2. The drawings are objected to because (1) it would appear that the section line "4-4" in figure 2 is misplaced in that the description of fig 4 seems to indicate that fig 4 illustrates the "lands", while the lands are in the control section and not the gripping section; (2) the #122 in the region of the control section (fig1) should be #124 (as per page 12, line 18); and (3) "222" in fig 20 should be #322. A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

3. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(4) because reference character "#s" 250,252,254 and 260 has been used to designate clearly distinct elements in figs 13 and 14 (and this error is also found in the corresponding portions of the written description). A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

4. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description: #304 (as per page 17, line 11) and #340(as per page 18, line 8). A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

5. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they include the following reference sign(s) not mentioned in the description: for example, nos. 328 and 330 in fig 20. A proposed drawing correction, corrected drawings, or amendment to the specification to add the reference sign(s) in the description, are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

Specification

6. The disclosure is objected to because of the following informalities: (1) applicant should update the referenced application on page 8; (2) "86/88" (page 10, line 3) should be – 36/38 --; (3) "58-68" (page 12, line 21) is confusing in that the "lands" have up to this point be nos. 58,60,62 and 64 (see page 9, line 20); (4) "20" (page 13, line 3) should be – 22 --; (5) "10 and 11" (page 14, line 3) should be – 9 and 10 --; (6) "1-9" (page 14, line 22) should be – 1-8 --; (7) the reference numerals of page 15, line 16-18 are confusing in that at least some of them are clearly WRONG (there is no "valley" 256 and in fact #256 is the cavity in fig 13); (8) "298" (page 17, line 9) should be – 293 --.

Appropriate correction is required.

Double Patenting

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

8. Claims 1-3,5-13 and 18-20 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-24 of U.S. Patent No. 6,601,272. The claims of the instant application are anticipated by the claims of the noted patent.

Claim Rejections - 35 USC § 112

9. Claims 2,3 and 20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 already recites a "distal brush section", which would imply that there is some type of brush at the distal end of the handle. As such, it is suggested that claim 2 be amended to "in which the distal brush section includes a toothbrush head with bristles". "Rigid base member" (claim 20, line 2) lacks antecedent as this element was not positively recited until claim 12. Applicant should review the claims for any additional informalities.

Claim Rejections - 35 USC § 103

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 1-3 and 8-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Saltzman (USP 2,304,319) in view of Lewkowicz (USP 5,465,449). The patent to Saltzman discloses a toothbrush comprising a proximal grip section (11), distal brush section (10) and a central control section (15) wherein the control section is defined by two pairs of "lands" (17) on opposite sides of the control section. The patent to Saltzman discloses the invention substantially as claimed with the exception of the "lands" being elastomeric. The provision of an elastomeric material at at least the portions of a toothbrush handle has become very common in the art of toothbrushes and such is reasonably taught by Lewkowicz, which discloses the provision of a rubber material (26,28) on the portions of the handle intended to be gripped by the user's fingers. It would have been obvious to one of ordinary skill to have provided such an elastomeric material to the portions (17) of the "lands" of Saltzman to make the brush more comfortable and to help prevent the handle from slipping during use. The angle (beta) as recited in claims 8 and 9 (and defined in fig 4) is taught by Saltzman (see fig 3). The patent to Lewkowicz discloses inverted teardrop finger engaging regions or "lands" and would teach one of ordinary skill to modified the regions (17) in a similar

manner. The provision of the elastomeric material in the regions (17) would provided a "raised" design (claim 11).

12. Claims 1-3,5,6,8,9,12,13 and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Saltzman 9USP 2,304,319) in view of Beals et al (USP 6,234,798).

The patent to Saltzman, as mentioned above, discloses the three distinct section of a toothbrush handle and further wherein the central control section includes two pairs of "lands" on opposite sides of the handle axis. As also mentioned above, the patent to Saltzman discloses the invention substantially as claimed with the exception of the "lands" including an elastomeric material. As previously states, the provision of an overmolded elastomeric material to a rigid base material in a toothbrush handle has become very common in the toothbrush art. The patent o Beals discloses such an arrangement including a rigid material (12) as well as an elastomeric material (15-18) having a Shore A hardness 5 to 95 (claim 18) of at least on the regions of the handle to be engaged by the user's fingers. It would have been obvious to have provided an elastomeric material to the handle of Saltzman in view of Neals to make the handle more comfortable and to help prevent slipping. With regard to claims 5 and 6, the patent to Beals teaches the provision of a proximal region of the handle with an ellipsoidal shape and that one of ordinary skill would deem it obvious to modify the structure of the proximal region (11) of Saltzman as such to remove any sharp corners. The particular base material (claim 13) would amount to an obvious choice of design to one of ordinary skill. The patent to Beals also discloses covering a substantial portion

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of the rigid material with the elastomer while leaving some portions thereof exposed (claims 19 and 20).

Allowable Subject Matter

13. Claim 7 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claim, notwithstanding the double-patenting rejection.

Conclusion

14. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The patent to Heinzelman et al is pertinent to the overmolding and the other to toothbrushes provided with specific finger engaging handle regions.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mark Spisich whose telephone number is (571) 272-1278. The examiner can normally be reached on M-Th (6-3:30), Alternate Fri off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert J Warden can be reached on (571) 272-1281. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Mark Spisich
Primary Examiner
Art Unit 1744

MS